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In The

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE COMPANY, EARTH SYSTEMS, INC., and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether federal courts have jurisdiction over actions brought by ERISA plan fiduciaries to enforce recoupment provisions in ERISA plans against plan participants or beneficiaries for medical expenses paid for injuries caused by third-party tortfeasors.

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties. Petitioners amend the corporate disclosure statement in their Petition for a Writ of Certiorari to state that Petitioner Great-West Life & Annuity Insurance Company has as a parent a publicly held company, Great-West Lifeco, Inc., which has as parent corporations Power Financial Corporation of Canada and Power Corporation of Canada, all of which are publicly traded on the Toronto Stock Exchange.

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OPINIONS BELOW

This action was initiated by Petitioners in the United States District Court for the Central District of California, and that court entered summary judgment in favor of Respondents. The order granting summary judgment is reprinted in J.A. 237-49.[1] There is no official citation to that order. The Petitioners moved for reconsideration of that order and Respondent Janette Knudson moved for an award of attorney's fees under ERISA. The district court granted the motion for attorney's fees and denied Petitioners' motion for reconsideration. The order disposing of these motions is reprinted in Appendix D to the Petition for a Writ of Certiorari.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit, case number 98-56472, and that Court entered an opinion on February 7, 2000. The opinion is reprinted in J.A. 250-53. The citation for the unpublished opinion is *Great-West Life & Annuity Insurance Company, et al. v. Knudson*, No. 98-56472, 2000 WL 145374 (9th Cir. Feb. 7, 2000), 208 F.3d 221 (9th Cir. 2000) (table).

Respondent Janette Knudson moved for attorney's fees under ERISA, and Petitioners filed a Suggestion for Rehearing *En Banc*. On March 22, 2000, the Ninth Circuit denied the Suggestion for Rehearing *En Banc*. On April 3,

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[1] The district court's order granting summary judgment should be read in conjunction with its previous order granting Respondents' motion to remand the related state court action that was previously removed to federal court and remanded to state court. The district court's remand order is reprinted in J.A. 171-75. There is no official citation to that order.

2000, the Court denied Respondent's motion for attorney's fees.

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the United States District Court for the Central District of California. The court entered summary judgment in favor of Respondents. Petitioners timely appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit entered its order on February 7, 2000. Petitioners filed a Suggestion for Rehearing *En Banc*, which was denied on March 22, 2000.

The petition for a writ of certiorari was timely filed on May 9, 2000 under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

29 U.S.C. § 1132(a)(3):

> (a) Persons Empowered to Bring Civil Action
>
> A civil action may be brought –
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other

> appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . . .

28 U.S.C. § 1331:

> Federal question –
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

At the time of the automobile accident giving rise to the payment of medical benefits at issue here, Eric Knudson was an employee of an Earth Systems, Inc. ("Earth Systems") subsidiary. He and his wife, Janette Knudson, were covered persons under the Health and Welfare Plan for Employees and Dependents for Earth Systems, Inc. (the "Plan"). The Plan was self-funded by Earth Systems. Great-West Life & Annuity Insurance Company ("Great-West") acted as the claims service administrator for the Plan (J.A. 24, 32) and issued stop-loss insurance coverage that reimbursed the employer for claims in excess of $75,000 per year with respect to the loss in question. J.A. 33, 48.[2]

Mrs. Knudson's accident happened in June, 1992, when she lost control of the Hyundai automobile she was driving, which left the road and rolled over several times,

[2] Petitioners are the Plan, Earth Systems, and Great-West.

leaving her a quadriplegic. J.A. 112. The Plan paid benefits to Mrs. Knudson and/or her medical providers in the amount of $411,157.11 for her medical care. J.A. 238. In 1993, Mrs. Knudson and her husband filed suit in California Superior Court against the third parties allegedly responsible for her injuries, the car's manufacturer and distributors. J.A. 238. Petitioners were not parties to that lawsuit. J.A. 238-39. That action was ultimately settled for $650,000. J.A. 139-44.

This case involves the enforcement of a specific Right of Recovery provision of the Plan, which entitles Earth Systems to recoup the benefits paid on behalf of Knudson from that third-party recovery. The Plan in pertinent part provides:

> A third party may be liable or legally responsible for expenses incurred by a Covered Person for an illness; or a sickness; or a bodily injury.
>
> When this happens we will, subject to all other terms and provisions of this Booklet, pay any benefits which are payable for the expenses incurred by the Covered Person for the treatment of such illness, sickness or bodily injury (the "Loss").
>
> RIGHT OF RECOVERY. We will, at our sole option, have the right to recover from the Covered Person any payment for benefits paid for treatment of such Loss under this Booklet which the Covered Person is entitled to receive from the third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, the Covered Person receives from:

> The third party; or the third party's insurer or guarantor; or the Covered Person's uninsured motorists insurance.
>
> This lien will not exceed:
>
> the amount of benefits paid under this Booklet for the treatment of the Loss; or
>
> the amount received by the Covered Person for such medical treatment from the third party.
>
> CONDITIONS:
>
> The Covered Person must cooperate fully with us in asserting our right to recover. If the Covered Person: – makes any recovery as set forth in this provision; and – fails to reimburse us fully for any benefits paid under this provision; then he will be personally liable to us to the extent of such recovery up to the amount of the first lien.
>
> Before any benefits are paid for the treatment of such Loss under this Booklet, we may require the Covered Person to provide all information and sign and return all documents necessary to exercise our rights under this provision.

J.A. 58-59.

After Mrs. Knudson was injured, her husband signed a Right of Recovery Agreement on behalf of his disabled spouse, which states:

> As a member of the above named Plan, I have made a claim for covered medical expenses under the terms of the Plan for myself or dependent for the injury/illness detailed above. . . .

> I request that benefits be paid at this time without the necessity of awaiting final determination of responsibility. . . .
>
> I also understand that under the terms of the Plan, the Plan may recover from me any payments for benefits paid under this Plan for which I or my dependents may be entitled to receive from a third party. The Plan shall automatically have a first lien upon any recovery, whether by settlement, judgment or otherwise, that I or my dependents receives from another party, the other party's insurer or guarantor, or my own insurer or guarantor. Said first lien shall be for the amount of medical and hospital benefits paid by the Plan, I shall be personally liable to the Plan to the extent of such recovery up to the amount of its first lien. I agree to cooperate fully with the Plan in asserting its right to recover.

J.A. 77-78.

After the Knudsons acknowledged their obligations, Earth Systems paid $411,157.11 in benefits on Mrs. Knudson's behalf. If Eric Knudson had not signed the Right of Recovery Agreement, the Plan would not have paid for Mrs. Knudson's medical treatment. J.A. 69.

As the Knudsons' third-party action progressed, Mrs. Knudson's counsel and a representative from Great-West,[3] Louis Tuccitto, discussed resolution of Petitioners' right of recoupment. Mrs. Knudson's counsel was sent,

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[3] The discretionary responsibility for enforcing the Plan Right of Recovery provision had been assigned to Great-West by Earth Systems, a fiduciary of the Plan. J.A. 48.

on February 7, 1994, a copy of the Summary Plan Description containing the Right of Recovery provision. J.A. 54-66. Her counsel sent Great-West a letter on September 29, 1995, acknowledging Earth Systems' lien. Brief of Appellants, filed in the Ninth Circuit, at p. 11.

Despite this acknowledgment, Mrs. Knudson's attorney sought to compromise the lien in connection with settlement of the third-party action. *Id.* After learning that Mrs. Knudson was recovering $650,000 because of her injuries, Petitioners offered to reduce their lien by accepting $200,000 instead of $411,157.11, with Mrs. Knudson's counsel accepting $200,000 as an attorney's fee, and the remaining $250,000 being paid to Mrs. Knudson. *Id.* Mrs. Knudson's attorney refused. *Id.*[4]

On March 27, 1997, after these efforts at compromise failed, the Knudsons mailed to Great-West a motion to approve settlement in their third-party action, which was pending in California Superior Court. J.A. 233. They, however, did not serve Great-West (or Earth Systems) with a summons in that action. Brief of Appellants, filed in the Ninth Circuit, at p. 11. On April 22, 1997, Great-West removed to the United States District Court for the Central District of California the claims asserted against it, based upon 28 U.S.C. § 1441(c) and the "complete preemption" doctrine under ERISA. J.A. 167-70. On June 30, 1997, the district court remanded those claims to state court, holding that Great-West was not a party-defendant

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[4] Ultimately, Mrs. Knudson's attorney received $373,426 of the $650,000 settlement for fees and costs. J.A. 141.

in the state court action nor "in a position to itself oppose Plaintiffs' motion for approval." J.A. 171-75.

On May 19, 1997, Petitioners filed the present action, which was amended on July 7, 1997, and thereafter served on the Knudsons. J.A. 81-95. On July 9, 1997, the district court denied, based, in part, upon the Anti-Injunction Act, Petitioners' application for temporary restraining order. J.A. 96-99.

On July 23, 1997, the California Superior Court approved the settlement of Knudsons' state court action against the third parties allegedly responsible for Mrs. Knudson's injuries. J.A. 139-44. In that settlement, the parties allocated only $13,828.70 of the $650,000 settlement to repayment of the $411,157.11 in past medical expenses. J.A. 141. The Petitioners were not parties to that settlement proceeding.

In December, 1997, Petitioners moved for summary judgment, moved for leave to file their Second Amended Complaint to add Jeffrey S. Pop, his law firm, and Louise Curinga, Trustee of the Special Needs Trust, as defendants, and moved for preliminary injunction against the new parties. J.A. 7-9. The Knudsons filed their cross-motion for summary judgment. J.A. 11-13.

On May 18, 1998, the district court granted Knudsons' motion for summary judgment and denied Petitioners' motion for summary judgment. J.A. 237-49. Because it granted summary judgment to Respondents, the court did not consider Petitioners' motion for leave to file a Second Amended Complaint. J.A. 249. Petitioners then filed a motion for reconsideration. J.A. 19. On July

10, 1998, the district court denied the motion for reconsideration and granted Janette Knudson's motion for attorney's fees pursuant to ERISA § 502(g)(1). J.A. 21; Appendix D to the Petition for a Writ of Certiorari.

Petitioners timely appealed to the Ninth Circuit, which issued its memorandum decision on February 7, 2000. J.A. 250. The Ninth Circuit affirmed the district court's judgment, but did "so on grounds different from those relied on by the district court." J.A. 251. Rather than reaching the merits of any of Petitioners' multiple arguments that the district court had erred, the Ninth Circuit, citing its prior decision in *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1262 (1997), concluded that reimbursement of payments made to an ERISA plan beneficiary was not "appropriate equitable relief" within the meaning of ERISA § 502(a)(3). J.A. 252-53. According to that decision, a plan's claim for "equitable reimbursement" from a plan participant's third-party recovery was not cognizable under ERISA § 502(a)(3) because (1) the "substance of the remedy sought" was for monetary relief and (2) restitutionary claims under § 502(a)(3) were limited by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), to the return of "ill-gotten" gains. The Ninth Circuit's rejection of Petitioners' ERISA claim, it noted, could be regarded as "based either on lack of subject matter jurisdictions or on the merits [*i.e.*, ERISA provided no cause of action]." J.A. 252, 53 & n.5.

SUMMARY OF THE ARGUMENT

The relief sought by the Petitioners in this case – the enforcement of the Earth Systems Plan's reimbursement provision against Plan participants and beneficiaries – is provided by § 502(a)(3) of ERISA which authorizes actions "(A) to enjoin any act or practice which violates . . . the terms of [a] plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of [a] plan." Claims to enjoin the violation of the Plan's reimbursement provision and to enforce its terms by requiring reimbursement from the Knudsons of the amounts in question fit precisely within the plain language and meaning of § 502(a)(3).

The holding of the Ninth Circuit in this case and *Owens* is based on an erroneous characterization of a claim seeking enforcement of a plan reimbursement provision as one which is seeking "money damages" rather than "appropriate equitable relief" within the meaning of § 502(a)(3). Such a characterization fails to distinguish between an award of money damages as compensation for an injury and compelling the performance of a contractual promise that happens to be a promise to pay money. In *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250 (2000), this Court stated that the term "appropriate equitable relief" in § 502(a)(3) should be guided by common law principles. Compelling the performance of a monetary obligation has been characterized consistently as equitable relief and distinguished from money damages under common law, although the precise label attached to such equitable relief has varied from case-to-case and court-to-court, but

has included "mandatory injunction," "specific performance," "restitution," "equitable lien," and "constructive trust." Indeed, drawing largely on common law principles, the Courts of Appeals for the Seventh, Eighth, and Eleventh Circuits have attached such labels to relief sought in actions seeking enforcement of reimbursement provisions similar to the one at issue in this case.

This Court, itself, has specifically distinguished between money damages and equitable remedies which involved the payment of money. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879 (1988). Moreover, it has recognized that, for purposes of § 502(a)(3), an unquestionably equitable remedy – "constructive trust" – could be applied to recover money for a plan from a party who had not obtained such funds by either fraud or wrongdoing. *See, e.g., Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. at 251.

The Ninth Circuit's holding also erroneously relies on this Court's holding in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), that "appropriate equitable relief" as used in § 502(a)(3) does not include ***compensatory money damages***. *Mertens*, unlike the present case, clearly involved a claim for compensatory money damages, *i.e.*, monetary relief for all losses sustained by a plan as a result of an actuarial firm's allegedly wrongful failure to change the plan's actuarial assumptions, causing the plan to be underfunded and eventually terminated. Moreover, this Court stated that "appropriate equitable relief," for purposes of § 502(a)(3) means those remedies traditionally thought of as equitable relief and typically available in equity, such as injunction, mandamus, and restitution. Compelling the performance of a contractual

promise has traditionally been characterized as equitable relief, even if the contractual promise involves the payment of money.

As this Court also recognized in *Varity v. Howe*, 516 U.S. 489, 515 (1996), the meaning of the term "appropriate equitable relief" should for purposes of § 502(a)(3) be interpreted to the extent possible to be consistent with the purposes of ERISA as well as its literal language and the common law of trusts. An interpretation of § 502(a)(3) which permits the enforcement of a vital term of a plan clearly is consistent with ERISA's objectives.

Finally, even if this Court were to find that the relief sought by Petitioners is not firmly grounded in § 502(a)(3), this Court should fashion federal common law to provide such relief in order to fill a clearly unintentional gap in ERISA's civil enforcement scheme – provision of a remedy to enforce a term of a plan that happens to require the payment of money.

ARGUMENT

A. The Relief Sought In This Case Is Specifically Authorized By § 502(a)(3) Of ERISA

In both the present case and *Owens*,[5] the Ninth Circuit held that an action seeking to enforce a plan participant's obligation to pay money to a plan under a reimbursement provision of the plan was not "equitable

[5] *FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997).

relief" within the meaning of § 502(a)(3) of ERISA. That section provides as follows:

> (a) A civil action may be brought –
>
> (3) by a participant, beneficiary, or fiduciary (A) ***to enjoin any act or practice which violates*** any provision of this subchapter or ***the terms of the plan***, or (B) ***to obtain other appropriate equitable relief (i) to redress such violations*** or (ii) ***to enforce any provisions of this subchapter or the terms of the plan***[.]

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (emphasis added).

In Petitioners' First Amended Complaint, Petitioners allege that Respondents violated the terms of the Plan by failing to reimburse the Plan, for the cost of medical benefits that the Plan paid to Mrs. Knudson for medical care as a result of her accident, from her recovery of an amount in excess of such benefits in settlement of a claim against third parties who purportedly caused such losses. The first claim for relief in the First Amended Complaint ("Injunction Against Acts and Practices That Violate the Terms of the Plan") states as follows:

> 13. Pursuant to 29 U.S.C. § 1132(a)(3), Plaintiffs seek an injunction against Defendants: (1) to prevent the Defendants from violating the terms of the Plan and (2) to enforce the terms of the Plan.
>
> 14. By not agreeing to reimburse the Plan the amount recovered, Defendants have violated, and therefore breached the terms of the Plan.

> 15. Since this act and/or practice violates the Plan's terms, this Court should enter an order enjoining Defendants and all of those persons in the active concert or participation with them, from violating the Plan's terms.
>
> 16. Specifically, the Court should enjoin Defendants and all those in active concert or participation with them, to reimburse the Plan in the amount of $411,157.11 out of any proceeds they recovered from third parties.

J.A. 92.

Such a claim squarely falls within the language of § 502(a)(3) which authorizes an action "(A) to enjoin any act or practice which violates . . . the terms of [a] plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of [a] plan. . . . " Nothing in § 502(a)(3)(A) expressly or impliedly prohibits the injunctive relief authorized by that provision from including an injunction requiring a plan participant to pay money which it is obligated to pay under the terms of a plan (or, put another way, the payment of which is necessary to cure a violation of the terms of the plan).

Longstanding equitable principles hold that an injunction can take the form of a requirement that a party perform some ***affirmative*** act, rather than forbid a party from engaging in certain conduct. 1 Dan B. Dobbs, Law of Remedies: Damages – Equity – Restitution § 2.9(1), at 224 (2d ed. 1993). For example, in order to enjoin a party from violating a contractual duty, a court may order a ***mandatory injunction*** that compels the party to carry out some positive act of performance. *Id. See also* 3 *id.* § 12.8(1), at

190 (noting that the remedy of specific performance is a form of mandatory injunction in which the court orders the defendant to perform the contract). *Cf.* 4 J. Pomeroy, Equity Jurisprudence § 1692 (4th ed.) ("restraining the breach of a contract by injunction is merely a mode of specifically enforcing the contract[, thus] the discretion of the court in awarding the injunction is guided by the same equitable principles and doctrines as those which regulate the remedy of specific performance.").

The Petitioners' First Amended Complaint specifically seeks ***to enjoin Respondents from violating the terms of the Plan's reimbursement provision*** and to enforce such terms by requiring the Respondents to pay the Plan the settlement proceeds to which the Plan is entitled under such terms. Accordingly, they have stated a claim for relief which is available under the plain meaning of § 502(a)(3).[6]

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[6] Under accepted principles of statutory construction, it should be inferred from the reference in § 502(a)(3)(B) to "***other*** appropriate equitable relief" that the relief authorized in § 502(a)(3) "to enjoin any act or practice which violates . . . the terms of [a] plan" is, itself, "appropriate equitable relief." *See, e.g.*, 2A Norman J. Singer, Statutes and Statutory Construction § 46:05, at 154 (6th ed. 2000) ("[E]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole. . . . "); *id.* at 165 ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter . . . "); *id.* § 46:06 at 181-190 (" 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant,

B. Petitioners Seek A Form Of Relief Traditionally Recognized As Equitable In Character

The U.S. Court of Appeals for the Ninth Circuit held in this case and *Owens* that § 502(a)(3) of ERISA allows a fiduciary to seek relief to enforce the terms of a plan but does not permit such relief to include the recovery of money, except perhaps in the form of restitution of "ill-gotten" assets or profits taken from a plan through fraud or wrongdoing. *Owens*, 122 F.3d at 1261. The Ninth Circuit's holding in these cases relies principally upon its interpretation of this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), in which the Court held that the phrase "appropriate equitable relief" as used in § 502(a)(3) does not include ***compensatory money damages.***

1. *Mertens* Authorizes, Rather than Bars, the Type of Relief Sought in this Case

Mertens involved an action against a nonfiduciary actuarial firm to recover losses to a plan allegedly resulting in the actuarial firm's failure to change the plan's actuarial assumptions, causing the plan to be underfunded and eventually to be terminated. 508 U.S. at 250. As the Court stated, the relief sought in *Mertens* was "nothing other than compensatory damages – monetary

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and so that one section will not destroy another unless the provision is the result of obvious mistake or error.") (internal citation and footnotes omitted).

relief for all losses [the] plan sustained as a result of the alleged breach of fiduciary duties." *Id.* at 255.

Petitioners argued that the relief they sought was "equitable relief" because under the common law of trusts, relief for breaches of trust, including compensatory damages, was obtained in courts of equity. The Court rejected that argument. *Id.* at 255-256. Rather, the Court interpreted the term "equitable relief" for purposes of § 502(a)(3) to mean those remedies traditionally thought of as equitable relief and typically available in equity "***such as injunction***, mandamus, and restitution" as distinguished from legal relief, such as compensatory money damages, which would generally be beyond the scope of an equity court's authority. *Id.* at 256 (emphasis added). Nowhere in *Mertens* does the Court even suggest that the term equitable relief ***never*** includes the payment of money. As demonstrated hereafter, the types of relief referred to by this Court in *Mertens* as examples of equitable relief often include the award of monetary relief other than compensatory money damages. Moreover, it is clear by the use of the term "such as" that this Court did not interpret § 502(a)(3) as limiting "appropriate equitable relief" to only injunction, mandamus, and restitution and as excluding other traditional forms of equitable relief like specific performance.[7]

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[7] Moreover, *Mertens* does not address the language of ERISA § 502(a)(3)(A) which authorizes actions "to enjoin any act or practice which violates . . . the terms of [a] plan," which is relief expressly sought in this case. *See supra* pp. 12-14.

The present case is clearly distinguishable from *Mertens*. Unlike *Mertens*, in which the relief sought was clearly compensatory money damages – a classic form of legal remedy – the Petitioners in this case seek to enjoin Respondents from violating their Plan's reimbursement provision. Requiring Respondents to reimburse the Plan under its reimbursement provision could be and has been appropriately characterized by other federal Courts of Appeals as "mandatory injunction," "specific performance," "restitution," and "constructive trust" and is precisely the type of relief authorized by the language of § 502(a)(3) and falls within the types of traditional equitable relief noted by this Court in *Mertens*.

2. An Action Seeking to Enjoin or for the Specific Performance of an Obligation is a Typical Form of Equitable Relief, Even if the Obligation Involves the Payment of Money

In this case, the Petitioners seek to require the performance by Mrs. Knudson of her obligation under the terms of the Plan to reimburse the Plan for medical benefit payments from the amounts that she recovered in settlement of an action against third parties allegedly responsible for her injuries in an auto accident. Contrary to the Ninth Circuit's characterization of such an action as one for ***money damages*** for breach of contract, this Court, consistent with longstanding common law jurisprudence, has characterized such a remedy to be one for equitable relief that happens to involve the payment of money.

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), for example, the Court explicitly distinguished between an action seeking "money damages" of the sort that it disallowed under § 502(a)(3) in *Mertens* and a suit seeking specific enforcement of an obligation to reimburse money. In *Bowen*, the State of Massachusetts sought reimbursement from the Federal Department of Health and Human Services ("HHS") of services performed by Massachusetts agencies that purportedly were reimbursable under Medicaid. HHS argued that the district court which originally awarded Massachusetts the relief it requested lacked jurisdiction to award such relief pursuant to § 702 of the Administrative Procedure Act which bars the district court's review of actions against federal agencies seeking "money damages." The Court held that the state's action for reimbursement was not one for damages. In so doing, the Court explicitly distinguished between the remedy, "money damages" and a remedy of "specific performance" which involved the payment of money:

> Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' D. Dobbs, Handbook on the Law of Remedies 135 (1973). Thus, while in many instances an award of money is an award of damages, 'occasionally a money award is also a specific remedy.' *Id.* Courts frequently describe equitable actions for monetary relief under a contract in exactly those terms. *See, e.g., First*

> *National State Bank v. Commonwealth Federal Savings & Loan Association*, 610 F.2d 164, 171 (3d Cir. 1979) (specific performance of contract to borrow money); *Crouch v. Crouch*, 566 F.2d 486, 488 (5th Cir. 1978) (contrasting lump-sum damages for breach of promise to pay monthly support payments with an order decreeing specific performance as to future installments); *Joyce v. Davis*, 539 F.2d 1262, 1265 (10th Cir. 1976) (specific performance of a promise to pay money bonus under a royalty contract).

487 U.S. at 895.

The Court, accordingly, recognized that a suit to enforce a statutory mandate for the reimbursement of money to be an ***equitable suit*** for specific monetary relief. *Id.* at 900-901. *See also Albemarle Paper Company v. Moody*, 422 U.S. 405, 416 (1975) (recognizing that an award of backpay is an equitable remedy); *Kross v. Western Electric Company, Inc.*, 701 F.2d 1238, 1244 n.7 (7th Cir. 1983) (finding that an award of backpay constitutes equitable relief under § 502(a)(3), relying on *Albemarle Paper*).

Subsequent to *Bowen* and *Mertens*, in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000), the Court stated that the construction of the term "appropriate equitable relief" in § 502(a)(3) should be guided by common law principles. *Harris Trust*, 530 U.S. at 250. As this Court recognized in *Bowen*, the specific performance of a monetary obligation has long been recognized under the common law as equitable relief. Professor Dan B. Dobbs, in his Handbook on The Law of Remedies, Damages – Equity – Restitution, recognized that: "When a court orders specific performance it may make money awards as necessary to give complete

relief[.]" Volume 1, § 3.1 at 279 n.8 (2d ed. 1993). Dobbs recognized further that sometimes a money award is also a specific performance remedy. In this regard, Dobbs explained that: "When the plaintiff was never entitled to anything but money, the recovery of an award of money is a kind of [specific performance]." *Id.* at 280.

Likewise, equitable principles specifically allow injunctive orders that compel the payment of money. *Id.* § 2.6(1), at 152. As recognized by the Third Circuit: "It is not unusual for a defendant in equity to expend money in order to obey or perform the act mandated by an injunction. Injunctions, which by their terms compel expenditures of money, may similarly be permissible forms of equitable relief." *United States of America v. Price*, 688 F.2d 204, 213 (3d Cir. 1982); *cf. Penn Terra Limited v. Department of Environmental Resources, Commonwealth of Pennsylvania*, 733 F.2d 267, 278 (3d Cir. 1984) ("in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.").

Other federal Courts of Appeals which have addressed whether the enforcement of a plan reimbursement provision similar to that in the present case is relief authorized under § 502(a)(3) have characterized such a remedy as "specific performance" or "injunctive" relief, which they have held to be "equitable" remedies within the meaning of § 502(a)(3). In so doing, they have expressly rejected the Ninth Circuit's holding and reasoning in *Owens*.

In *Administrative Committee v. Gauf*, 188 F.3d 767 (7th Cir. 1999), the Wal-Mart Associates Health & Welfare Plan

filed suit against Wal-Mart employee Patricia Gauf seeking to compel reimbursement of benefits pursuant to a plan provision requiring reimbursement when employees obtain a third-party tort recovery for damages arising out of the medical condition for which the plan previously paid benefits. As in the present case, the plan sued under ERISA § 502(a)(3) to obtain "other appropriate equitable relief . . . to enforce . . . the terms of the plan."

Gauf argued that the plan was, in effect, seeking a legal remedy because the ultimate purpose of the suit was to obtain reimbursement of money, and thus, its action could not lie under § 502(a)(3). The Seventh Circuit rejected this argument, stating:

> Although the pertinent parts of the complaint employ a variety of terms to express the relief requested, we believe that a fair reading of the document in its totality makes clear that the Committee is seeking an equitable remedy against Ms. Gauf to insure her compliance with the terms of the Plan. For example, the complaint requests "specific performance and enforcement" of the contract and an "order enjoining Defendant from continuing to violate the terms of the Plan."

Id. at 770.

In reaching its conclusion, the *Gauf* court acknowledged the holding of *Owens*, but wholly rejected it, stating that "our Circuit has consistently held that a complaint purporting to state a claim for equitable relief

under a reimbursement clause in a benefits contract is an equitable claim for purposes of ERISA Section 502(a)(3)."[8]

The Eleventh Circuit also rejected the *Owens* decision in *Blue Cross and Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998). As in *Owens*, *Gauf*, and the present case, the action in *Sanders* arose out of a plan provision permitting the plan to obtain reimbursement in the event the participant obtained a tort recovery against a third party. As in *Gauf*, the defendants relied upon *Owens'* conclusion that a reimbursement claim is an action for legal relief unavailable under § 502(a)(3).

The Eleventh Circuit squarely rejected this argument, stating that:

> *Owens* appears to be based on an unduly narrow reading of *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). . . . The Court in *Mertens* did not imply that specific performance is unavailable under 29 U.S.C. § 1132(a)(3)(B). Because specific performance is a traditional form of equitable relief, . . . we believe that specific performance may be equitable relief available under 29 U.S.C. § 1132(a)(3)(B).[9]

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[8] 188 F.3d at 771, *citing Harris Trust & Savings Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 615 (7th Cir. 1995); *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Neurobehavioral Associates, P.A.*, 53 F.3d 172, 173-74 (7th Cir. 1995).

[9] *Id.* at 1352-53 n.5. *See also In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d 1255, 1268-69 (3d Cir. 1995).

In *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999), another suit in which the plaintiffs were seeking to enforce a welfare plan reimbursement provision similar to the one in the present case, the Seventh Circuit found that such relief was authorized under § 502(a)(3). Besides stating that the plaintiff's reimbursement claim could properly be characterized as an action for a constructive trust, the court held also that it could be characterized as an action seeking "a mandatory injunction directing [the defendant plan participant] to sign over her claim to the money" as well as one for an "equitable lien."[10] *Id.* at 711. The Seventh Circuit found all of these types of relief (*i.e.*, constructive trust, mandatory injunction, and equitable lien) to be "securely equitable." *Id. See also Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996) (specific performance of a plan's subrogation provision constitutes "appropriate equitable relief" within the meaning of § 502(a)(3)).

The Complaint in the present action seeks an injunction, which, among other things, requires Mrs. Knudson's payment to the Plan of the funds which Mrs. Knudson is obligated to pay under the Plan's reimbursement provision. Consistent with the authorities cited above, the relief which Petitioners seek unquestionably can be characterized as the equitable remedies of either injunction or

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[10] The Plan's reimbursement provision creates a *lien* on the funds recovered by the Knudsons from the third parties allegedly responsible for Mrs. Knudson's injuries, which lien the Respondents are seeking to specifically enforce. First Amended Complaint at ¶¶ 9, 15.

specific performance, and not "money damages" as erroneously characterized by the Ninth Circuit.

3. The Relief Sought in this Case also may Properly be Categorized as "Restitution" or a "Constructive Trust"

The Ninth Circuit presumed that restitution involving the payment of money is only available as "equitable relief" when the money in question constitutes "ill-gotten" assets and stated that the plan participant in *Owens* had not obtained the funds subject to the plan's reimbursement provision "by any fraud or wrong-doing." 122 F.3d at 1261. The retention by plan participants like the Knudsons of the funds at issue in this case in violation of the terms of their Plan constitutes "wrong-doing." In any event, the Ninth Circuit's narrow interpretation of the scope of equitable remedies such as restitution and constructive trust as being limited to the recovery of funds obtained by fraud or other wrongdoing is neither consistent with the common law's treatment of restitution and constructive trust nor this Court's decision in *Harris Trust v. Salomon Brothers*.

Under the common law the equitable remedies of restitution and constructive trust could be utilized by one party to recover assets, including money from another party whenever it would be unconscionable for the latter party to retain and enjoy the use of the assets. As recognized by Dobbs:

> Thus restitution by way of constructive trust may be appropriate for . . . benefits transferred under mistake . . . It is entirely appropriate to

> award a constructive trust as a means of forcing restitution to prevent unjust enrichment. For this purpose, ***it does not much matter how the unjust enrichment came about***. What must give concern is not the method by which the defendant enriched himself, but the fairness and workability of the judicial decree.

Dan B. Dobbs, Handbook on The Law of Remedies, Damages – Equity – Restitution § 4.3, at 246 (1973) (emphasis added). *See also* 5 A. Scott, The Law of Trusts § 462.2 (4th ed. 2000) ("A constructive trust may arise, however, even though the acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it.").

This principle has been specifically applied in the context of the common law of trusts where it has been recognized that when a trust transfers property to a beneficiary it may maintain an equitable action to recover such property if the transfer was in violation of the trust's terms, regardless of whether the beneficiary could appropriately be characterized as a "wrongdoer" or the assets as "ill-gotten gains." *See Counihan v. United States of America*, 194 F.3d 357, 361-62 (2d Cir. 1999) (noting that imposition of a constructive trust does not require the performance of any wrongful act by the enriched party, and affirming district court's imposition of a constructive trust based upon circumstances where "the holder of legal title should not, in good conscience and equity, retain the benefits derived from such title").

Relying on similar common law principles, this Court held in *Harris Trust* that an action under § 502(a)(3) could be maintained against a nonfiduciary party-in-interest

who participated in a transaction prohibited by ERISA § 406(a) although such party had not breached any duty to the plan. 530 U.S. at 245-247. The Court noted that, "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate herein.' " 530 U.S. at 250 (*quoting Moore v. Crawford*, 130 U.S. 122, 128 (1889), and 2 J. Pomeroy, *Equity Jurisprudence* § 1053, at 628-629 (1886)).

Another federal Court of Appeals, in enforcing a similar plan reimbursement provision, has expressly rejected the Ninth Circuit's position in *Owens* that restitutionary relief can only be characterized as "equitable" for purposes of § 502(a)(3) when it involves the recovery of money or other assets obtained by fraud or wrongdoing. Thus, in *Health Cost*, the Seventh Circuit found that the enforcement of the plan reimbursement provision, in addition to being properly characterized as an equitable lien or mandatory injunction, could also be characterized as a constructive trust which "is, of course, an equitable remedy." 187 F.3d at 711. The Seventh Circuit dismissed the Ninth Circuit's rejection of this type of relief under § 502(a)(3) as follows:

> So Health Cost is indeed seeking a constructive trust and while the Ninth Circuit appears to believe that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust, *FMC Medical*

> *Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997), it has given no reason for this belief and there is no basis for it either in ERISA or in the principles of equity. Granted that in times of yore the constructive trust was available only as a remedy against trustees and other fiduciaries, 1 Dobbs, *supra*, § 4.3(2), p. 597, there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp. In ordinary trust law the historical limitation of the remedy has been abandoned. *Id.* at § 4.3(2), pp. 597-98; 5 Austin Wakeman Scott & William Franklin Fratcher, Scott on Trusts § 462 (4th ed. 1989). We do not think the motto of our law should be "let the dead bury the living."

Health Cost, 187 F.3d at 710.

In view of the Knudsons' violation of the terms of the Plan's reimbursement provision and the fact that the failure to enforce their obligation under that provision would leave them unjustly enriched at the expense of the Plan and its other participants and beneficiaries, there can be no doubt that it would be "unconscientious" for them to retain the funds owing to the Plan and that the recovery of such funds would constitute an equitable remedy consistent with the above authorities.

C. Granting The Remedy Sought In This Case Would Be Consistent With ERISA's Purposes

As the U.S. Court of Appeals for the Sixth Circuit has stated, "a primary purpose of ERISA is to ensure the integrity and primacy of the written plans." *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997). *See also Gulf Life Insurance Co. v. Arnold*, 809 F.2d 1520, 1523

(11th Cir. 1987) ("The purpose essential to Section 1132(a)(3)(B) is to enforce the terms of [a] plan . . . "). Affirming the Ninth Circuit's holding in this case, however, would leave the Plan without a remedy to enforce a vitally important provision of the Plan merely because the enforcement of such provision involves the reimbursement of money. Other than § 502(a)(3), no other provision of § 502 can be construed to provide such relief. At the same time, any state law action seeking the enforcement and interpretation of the terms of an ERISA-covered employee benefit plan would unquestionably "relate to [an] employee benefit plan" for purposes of § 514(a) of ERISA, and, accordingly would be preempted under that section.[11] *See Pilot Life Ins. Co. v. Dedeaux*, 481

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[11] Thus, in *Jefferson-Pilot Life Ins. Co. v. Krafka*, 57 Cal. Rptr. 2d 723 (Cal. Ct. App. 1996), a third-party administrator of an ERISA-covered employee benefit plan sought to recoup benefits paid on behalf of a covered person after the covered person recovered from a third party for the same injuries that had been paid by the plan. The California Court of Appeals reversed the judgment granted in favor of the plan and ordered that the complaint against the plan be dismissed because federal courts have exclusive jurisdiction over recoupment actions brought by ERISA plan fiduciaries:

> [T]he federal courts have exclusive subject matter jurisdiction of civil lawsuits under ERISA, except for actions under Title 29 of the United States Code, § 1132(a)(1)(B) and (a)(7); the state courts have concurrent jurisdiction in matters arising under those sub-divisions. Section 1132(a)(1)(B) and (a)(7) authorize actions, respectively: "by a participant or beneficiary . . . to recover benefit due to him [or her] under the terms of his [or her] plan, to enforce his [or her] rights under the terms of the plan, or to clarify his [or her] rights to future benefits under the terms of

U.S. 41, 47 (1987). Under similar circumstances, this Court has construed § 502(a)(3) in a manner so as to prevent litigants from being deprived of any remedy under circumstances where such a result clearly would be inconsistent with a primary purpose of ERISA.[12]

In *Varity v. Howe*, 516 U.S. 489, 507 (1996), this Court addressed the issue of whether plan participants were authorized under § 502(a)(3) to seek individualized equitable relief for breaches of fiduciary duty. The Court held that such relief was so authorized under § 502(a)(3). In arriving at its decision, the Court concluded that such relief fell within the meaning of the term "appropriate equitable relief." It further found that its interpretation of that term was consistent with the common law of trusts and both ERISA's structure and purpose. In this regard, the Court found that Congress intended § 502(a)(3) to act

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> the plan" and "by a state to enforce compliance with a qualified medical child support order. . . . " Plaintiff is not a plan participant or beneficiary, nor is it a state. Therefore, plaintiff is not a proper party to bring an action in the state court under ERISA, § 1132(a)(1)(B) or (a)(7). In other words, any action plaintiff may be able to bring under ERISA is not a lawsuit as to which this court can exercise concurrent subject matter jurisdiction. In the absence of subject matter jurisdiction, plaintiff's complaint must be dismissed.

Id. at 726.

[12] Respondents concede that they could have brought an action under § 502(a) of ERISA seeking an interpretation of the Plan's reimbursement provision in order to attempt to resist its enforcement. Motion to Dismiss as Improvidently Granted, at pp. 11-12. It would be incongruous and unreasonable to interpret § 502(a) as denying representatives of the Plan a parallel cause of action to enforce the same Plan provision.

as a "safety net" to provide relief which was consistent with ERISA's objectives but that § 502 does not elsewhere provide. 516 U.S. at 512. Recognizing that the protection of plan beneficiaries from breaches of fiduciary duty was a paramount objective of ERISA, the Court concluded:

> We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law.

Id. at 515.

Another primary objective of ERISA is to ensure the enforcement of the terms of a plan. *See, e.g., Gulf Life Insurance Co. v. Arnold*, 809 F.2d at 1523 ("The purpose essential to Section 1132(a)(3)(B) is to enforce the terms of [a] plan . . . "). Such an objective is manifest in the structure of ERISA which, among other things (i) requires fiduciaries to act in accordance with the terms of a plan,[13] (ii) provides plan participants and beneficiaries with a cause of action to enforce their "rights under the terms of the plan,"[14] and (iii) authorizes participants, beneficiaries and fiduciaries "to enjoin any act or practice which violates . . . the terms of [a] plan" or "to obtain other appropriate equitable relief . . . to redress such violation."[15] Moreover, as demonstrated above, the specific enforcement of the Plan's reimbursement provision constitutes "appropriate equitable relief" with the meaning of § 502(a)(3), particularly as that section is informed by

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[13] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

[14] ERISA § 502(a)(1)(B).

[15] ERISA § 502(a)(3).

common law principles. Under these circumstances, consistent with the reasoning of *Varity*, it would be incongruous to deprive a Plan fiduciary from enforcing the Plan's reimbursement provision, merely because such enforcement involves the payment of money.

Such a result also would be incongruous with the Court's recent decision in *Egelhoff v. Egelhoff*, 121 S. Ct. 1322 (2001), in which it held that a state law providing for the automatic revocation, upon divorce, of the designation of a spouse as beneficiary of a nonprobate asset was preempted, as it applied to ERISA benefit plans, because it directly conflicted with ERISA's requirement that a plan be administered in accordance with plan documents and interfered with nationally uniform plan administration. Likewise, this Court should not give an unreasonably narrow interpretation to ERISA's own enforcement provisions that would preclude the uniform enforcement of recoupment provisions in accordance with the terms of an ERISA plan.

D. Federal Common Law Also Can Be Applied To Provide The Relief Sought In This Case

A number of federal courts also have concluded that whether or not the requested relief is explicitly authorized under § 502(a)(3), the purposes of ERISA compel them to fashion federal common law to provide a remedy such as that sought by Petitioners.

1. This Court has Authorized Lower Courts to Fill Unintentional Gaps in the Text of ERISA Where Necessary to Provide a Remedy that Furthers the Intended Purpose of the Statute

This Court has held that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (*quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). When acting under this authority, federal courts are guided by the principles of traditional trust law. *Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16 (2d Cir. 1991).

Specifically in conducting an inquiry regarding whether a federal common law remedy should be fashioned, a court should: (1) ascertain the extent to which trust and pension law as developed by state and federal courts provide for recovery by the plaintiff; and if a requested form of additional relief is available under state trust law, then (2) consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. *Id.* at 18 (*citing Massachusetts Mutual Life v. Russell*, 473 U.S. 134 (1985) (Brennan, J., concurring)). Moreover, courts must bear in mind the ultimate consideration of whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA. *Id. See also Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 280 (2d Cir. 1992) (the inquiry "requires a consideration of whether there is a need for interstitial lawmaking and, if so, whether recognizing such a right of action would be

consistent with ERISA's scheme and further its purposes."). Application of these factors to this case permits this Court to fashion a federal common law remedy to provide relief to the Petitioners, should it conclude that ERISA § 502(a)(3) does not already do so.

a. The requested relief is available under established state trust law principles

Petitioners' requested relief, to enjoin Respondents from violating the terms of the Plan's reimbursement provision and to enforce that provision by requiring Respondents to reimburse the Plan from third-party settlement proceeds, is available under state law trust principles. As demonstrated above, injunctive relief is among a number of principles firmly grounded and recognized in trust law that would provide such a remedy. Specifically, a mandatory injunction, "that orders an affirmative act or course of conduct" (1 Dan B. Dobbs, Law of Remedies: Damages – Equity – Restitution § 2.9(1), at 224 (2d ed. 1993), may be ordered to compel the payment of money. *Id.* § 2.6(1), at 152. Moreover, specific performance has been described as "a form of injunctive decree." 3 *Id.* § 12.8(1), at 190, *citing Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc.*, 527 A.2d 1142, 1144 (Vt. 1987). A specific performance decree, too, may compel the order of money. *See* 1 *id.* § 3.1, at 279 n.8. Similarly, the requested relief can be afforded through the remedy of restitution, a staple in state trust law, to prevent unjust enrichment.

Incorporating any of these traditional trust law doctrines into the law of ERISA would simply be "following the legislative directive to fashion, where Congress has

not spoken, a federal common law for ERISA by incorporating what has long been embedded in traditional trust law and equity jurisprudence." *See Chemung*, 939 F.2d at 16 (concluding that the law of contribution, a traditional trust law right, should be recognized as a part of ERISA).

b. Allowing such relief would not conflict with some other aspect of the ERISA scheme and is necessary to further ERISA's purpose of enforcement of plan terms

Numerous federal courts have recognized that the type of relief sought in this case is grounded in trust law and is not contrary to ERISA's statutory scheme. For example, the Third Circuit has specifically recognized that the authority to develop the federal common law of ERISA "permits application of a federal doctrine of unjust enrichment if restitution would not override a contractual provision of an ERISA plan." *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1186 (3d Cir. 1991) (finding that "to permit restitution here would only further the goals of ERISA, that is to safeguard the corpus of funds set aside under the [plan] for valid [fund] beneficiaries."). *See also State Street Bank and Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 90 (1st Cir. 2001) (*citing Luby*, and affirming district court's order of restitution, upon concluding that returning disputed fund assets to their rightful owner protects the interest of the pension plan's participants). In the instant case, because the Plan document expressly provides for reimbursement, one who fails to comply with the terms and repay the Plan

those amounts recovered from some third party for the same expenses covered by the Plan has been unjustly enriched. Thus, not only would application of such a trust law doctrine not be *inconsistent* with any contractual provision of the ERISA plan at issue, application is *necessary* for the realization of an intention specifically provided in the Plan. *See Gulf Life Insurance Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987) ("The purpose essential to section 1132(a)(3)(B) is to enforce the terms of the plan of ERISA").

Similarly, the reasoning that prompted the Fourth Circuit in *Provident Life & Accident Insurance Company v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, 498 U.S. 982 (1990), to fashion a federal common law rule of unjust enrichment to be applied to a claim concerning an ERISA plan is wholly applicable here. In *Waller*, the plaintiff, as here, sought repayment of monies advanced to a plan participant. *Id.* at 993. The Court of Appeals concluded that where the plan provided for the repayment of the advanced monies, "the creation of a common law remedy here would further the contract between the parties and effectuate the clear intent of" the clause that specifically called for the repayment. *Id.* Moreover, the *Waller* court recognized that the requested relief was consistent with express rights provided in another ERISA provision, § 403(c)(2)(A), 29 U.S.C. § 1103(c)(2)(A). While that statutory provision allows for the return of mistakenly paid contributions made by employers to multiemployer plan funds, *id.*, the *Waller* court found that the section "indicates a desire to ensure that plan funds are administered equitably and that *no one party, not even plan beneficiaries, should unjustly profit.*" 906 F.2d at 993 (emphasis added).

The Fourth Circuit, thus, concluded that a purpose of ERISA is furthered by fashioning a federal common law rule that ensures that no party is unjustly enriched at the expense of the plan funds. *Id.*

As in *Waller*, the Plan in the instant case specifically provides for the requested relief – reimbursement of monies collected by the plan participant from third parties for the same expenses covered by the Plan. Thus, creation of a common law remedy for a plan fiduciary would further the contract between the parties and effectuate the clear intent of the Plan's reimbursement provision. Moreover, consistent with the conclusion of the Fourth Circuit, the relief sought accords with ERISA's recognized purpose of ensuring that plan funds are administered equitably and that no one party unjustly profits at the expense of the plan. Such relief also is consistent with ERISA's legislative scheme. *See also Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d at 281 (fashioning federal common law right of action for a participant against a nonfiduciary who knowingly participates in an ERISA-fiduciary's breach of duty where "the relief sought here is not inconsistent with ERISA's scheme or the common law of trusts, and furthers ERISA's important purposes.").

2. Application of Federal Common Law is Especially Appropriate Because a Federal Remedy is this Plan's Only Means of Obtaining Relief

The requested relief in this case has been held to "relate to" an employee benefit plan, and is thus preempted. *Jefferson-Pilot Life Insurance Co. v. Krafka*, 57 Cal. Rptr. 2d 723, 726 (Cal. Ct. App. 1996) ("This action alleges a violation of the terms of the plan and is brought to enforce the reimbursement provision of the policy. It follows that the plaintiff's state common law causes of action 'relate to' the plan and are preempted."). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 47 (recognizing that the phrase "relate to" has been interpreted as having a broad, common-sense meaning to preempt state common law tort and contract causes of action that relate to employee benefits plans). Moreover, ERISA's preemption clause is not limited to " 'state laws specifically designed to affect employee benefit plans.' " *Id.* at 47-48 (internal citation omitted).

When a state law remedy is preempted by ERISA, the federal court has all the more reason to fashion a remedy to provide relief that is consistent with ERISA's principles. *See Diduck*, 974 F.2d at 280-281 ("One factor pointing in favor of preemption is the 'expectation [ ] that a federal common law of rights and obligations under ERISA-regulated plans would develop.' ") (internal citation omitted). In light of ERISA's very broad preemption clause, Congress certainly did not intend to leave fiduciaries without federal remedies that are both *required* for the enforcement of the express terms of plans and *consistent* with the statute's scheme. *See Gulf Life*, 809 F.2d at 1523 ("The

purpose essential to section 1132(a)(3)(B) is to enforce the terms of the plan of ERISA"); *Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986) (*quoting* ERISA legislative history and noting that, "Without question, this language indicates a legislative focus on the direct *protection of plans*, . . . ") (emphasis added). Instead, Congress intended that federal courts would "step in" in instances precisely like the one before this Court, and ensure that plan funds are administered equitably and that no one party, unjustly profits. *Waller*, 906 F.2d at 993.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners respectfully ask that this Honorable Court reverse the judgment of the Ninth Circuit and remand the matter for further proceedings to determine the amount of reimbursement recovery that Petitioners are entitled to under the Plan reimbursement provision.

Respectfully submitted,

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